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WM. R. STANSBU
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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1922.**

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## No. [redacted]54

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AMERICAN RAILWAY EXPRESS COMPANY

*vs.*

LUCIUS P. LEVEE.

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

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## MOTION TO DISMISS.

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CHARLES T. WORTHAM,
*Counsel for Appellee.*

**(28,974)**

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1922.**

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## No. 424.

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AMERICAN RAILWAY EXPRESS COMPANY

*vs.*

LUCIUS P. LEVEE.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

---

## MOTION TO DISMISS.

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Now comes Lucius P. Levee, the respondent, and moves to dismiss the writ of certiorari herein issued for want of jurisdiction on the following grounds, to wit:

I. Because it was not "applied for within three months after entry of the judgment complained of."

II. Because it was not directed to the highest court of the State of Louisiana in which a decision of the question at issue could be had.

III. Because the decision of the State appellate court which was declared to be correct by the State Supreme Court did not involve a Federal question.

CHAS. T. WORTHAM,
*Counsel for Respondent for the Purposes of This Motion.*

Mr. A. A. MORENO,
*Counsel for the American Railway Express Co.:*

PLEASE TAKE NOTICE that on the 4th day of June, A. D. 1923, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of my brief or argument in support of said motion.

(Signed) CHAS. T. WORTHAM,
*Counsel for L. P. Levee for the Purposes of This Motion.*

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 424.

AMERICAN RAILWAY EXPRESS COMPANY

*vs.*

LUCIUS P. LEVEE.

STATE OF LOUISIANA,
*Parish of Ascension:*

Before me, the undersigned notary public, personally came and appeared Mr. Chas. T. Wortham, a resident of the Parish of Ascension, to me well known, and who, having been by me duly sworn, deposes and says:

That he is the counsel for the respondent in the foregoing numbered and entitled cause, and that a true and exact duplicate copy of the motion and of the notice to which this affidavit is attached as part thereof was by him mailed, together with a copy of the brief in support of said motion, to Mr. A. A. Moreno, attorney for petitioner, addressed to him at his usual and proper address, all duly postpaid, within ample time to reach the said A. A. Moreno by due course of mail more than three weeks before June 4th, 1923.

CHAS. T. WORTHAM.

Sworn to and subscribed before me this 8th day of May, A. D. 1923.

[Seal of Clyde V. St. Amant, Notary Public, Parish of Ascension, Louisiana.]

C. V. ST. AMANT,
*Notary Public.*

[Endorsed:] File No. 28,974. Supreme Court U. S., October term, 1922. Term No. 424. American Railway Express Co., appellant, *vs.* Lucius P. Levee. Motion to dismiss, notice, and proof of service. Filed May 11, 1923.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

## No. 54

(No. 424, October Term, 1922)

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

versus

LUCIUS P. LEVEE,
Respondent.

On Writ of Certiorari to the Court of Appeal, First Circuit, of the State of Louisiana.

## Brief on the Merits on Behalf of Lucius P. Levee, Respondent.

CHAS. T. WORTHAM,
Attorney for L. P. Levee,
Respondent.

IN THE

# SUPREME COURT OF THE UNITED STATES

(No. 424, October Term, 1922)

## No. 54

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

versus

LUCIUS P. LEVEE,
Respondent.

**On Writ of Certiorari to the Court of Appeal, First Circuit, of the State of Louisiana.**

**Brief on the Merits on Behalf of Lucius P. Levee, Respondent.**

## BRIEF.

MAY IT PLEASE THE COURT:

### Statement of Facts

This is the third brief filed by the respondent in this matter. The first brief was filed in opposition to the

granting of the writ by this Court, and then after the granting of the writ, a second brief was filed by him in support of his motion to dismiss.

This motion to dismiss was deferred by the Court for further consideration when the case would come up upon oral argument.

In the present brief we will not repeat any of the arguments made in the motion to dismiss, but will attempt to confine ourselves to argument upon the merits of the case as though the motion to dismiss had been denied. We do not mean, however, by this action to waive any rights which we might have upon the motion to dismiss, but earnestly ask the Court's attention to our former brief on the motion to dismiss, earnestly believing that that motion should be sustained.

The circumstances under which the shipment in question was delivered to the Express Co. are to be found on pages 29 and 30 of the record. See also the findings of fact by the trial Judge, p. 8.

Respondent was leaving Madisonville, Texas, for Thibodaux, La. He placed all of his property, including Liberty Bonds and other valuables, in a trunk. Just before his train left Madisonville, he took the trunk to the Express Office and asked to have it expressed to Thibodaux. The agent said, "Why don't you check it?" Respondent said, "No, I have some valuable papers and other valuables in the trunk, and I do not want to take

the chance of having it lost as baggage; I want it expressed to Thibodaux, and I want you to seal the trunk and express it." The agent stated that he did not know the rates, that he could not apply a rate on it; that he would ship the trunk and that Mr. Levee could pay the express charges at Thibodaux. However, he made out a receipt and handed it to Mr. Levee, but would not accept any money. Mr. Levee cautioned him very emphatically about sealing the trunk. Mr. Levee took his receipt, got on the train and left. Mr. Levee told the express agent that the trunk contained valuable papers and other valuables, but the agent did not ask him the value.

His reason for not wishing to send it as baggage was that it would not have been accepted at a valuation over about One Hundred and Fifty ($150.00) Dollars.

All we know of the subsequent history of this trunk is that it has never been delivered to us, and that the Express Co. has not made the slightest attempt, either by pleading or by proof, to show us what did happen to this trunk.

**Pleadings (P. 18, Record).**

The petition of respondent filed in the trial Court simply sets out:

(1st) The delivery of the trunk to the Express Co. under the circumstances and for the purpose aforesaid.

(2nd) Failure and refusal of the Express Co. to redeliver the trunk at Thibodaux or elsewhere.

(3rd) The value of the trunk and its contents.

(4th) The prayer is for judgment for the value.

THE ANSWER of the Express Co. (Tr., p. 26 et seq.) simply admits all of the foregoing allegations except that regarding value, and without in any way alleging or informing us what had become of the trunk, they set up the defense that under the receipt which its agent gave to Mr. Levee they were liable only for the sum of Fifty ($50.00) Dollars.

THE JUDGMENT of the State Court of Appeal now before this Court for review (Tr., p. 14 et seq.) was based upon the fact that the defendant had not carried the burden of proof imposed upon him by the law and jurisprudence of Louisiana in that it had shown no reason or excuse whatever for its failure and refusal to deliver the trunk as agreed: citing Article 2754 of the Louisiana Civil Code and quoting the same in full. Lahmann vs. M. L. & T. R. R., 115 La. 1; Sims vs. N. O. & N. E. R. R., 112 La. 268; National Rice Milling Co. vs. N. O. & N. E. R. R., 132 La. 615.

**Argument.**

Counsel for petitioner attempted to bring the case under the Cummins' Amendment, Act of March 4th,

1915, Chap. 176; 38 Stat. at L., 1196, as amended by Act of August 9th, 1916, Chap. 301; 39 Stat. at L. 441; Comp. Stat. Sect. 9582; Fed. Stat. Anno. Supp. 1918, p. 387.

We would attempt to show the Court that the present case does not come within the terms of that statute, and that there is a deep harmony between the decision of the Louisiana Court of Appeal (Record, p. 14) and the decisions of this Court upon the subject. The amendment (Act of March 4th, 1915, Chap. 176) makes the carrier liable to the shipper *"for any loss, damage or injury to such property caused by it," etc.*, notwithstanding any limitation of liability or recovery or representation or agreement as to value. See Am. R. Ex. Co. vs. Lindenburg, Law Ed., Advance Opinions 1922-1923, No. 7, page 228. This is amended by Act of August 9th, 1916, Chap. 301, 39 Stat. at L. 441; Fed. Stat. Anno Supp. 1918, page 388. The amendment refers only to the *loss, damage* or *injury* covered by the act which it amends. It is therefore clear that to bring any case within this statute, which with the amendment we will refer to as the Cummins' Amendment, the carrier must show that the shipment has been *lost by it, damaged by it or injured by it.*

In this case we did not know, and had no means of knowing whether the trunk had been lost, destroyed, or injured to such an extent that the remnants were thrown away as worthless, or whether the carrier still has our

trunk somewhere in its possession. We did not know whether the trunk had been delivered to some other person or whether it had been sent to a wrong delivery point and sold to cover freight charges. All these matters with a thousand other contingencies which might be mentioned were entirely within the knowledge of the carrier; that is to say, the law holds the carrier to such knowledge, the property being in its possession and under its control.

The law certainly does not impose upon a shipper, when he delivers a package to a carrier, the duty of following it up and keeping posted as to its whereabouts, from the time of its delivery to the carrier until delivered by the carrier at its destination.

We therefore brought our suit the only way we could bring it which was strictly upon the contract of carriage. All that we were required to prove to make a case was delivery to the carrier, and the failure of the carrier to redeliver to us. If the carrier had any defense to this suit it should have been set up in its answer and supported by proof upon the trial. The only defense set up by the carrier is the limited liability clause. In order to succeed upon this defense it is necessary for the carrier to show a case which brings it within the terms of the Cummins' Amendment as amended.

To do this it was absolutely necessary for the carrier to allege and prove that the trunk had been lost by it.

We do not mention damage, or injury, because that would suppose the trunk had been delivered in a damaged or injured condition, as in the Lindenburg case, cited supra.

We feel that we have an inherent right to know what became of this trunk in order that we may know whether or not we have been lawfully deprived of our property.

To reverse the judgment rendered in this case upon the pleadings and proof as they appear in the record would be to place it within the power of any carrier to keep a valuable shipment and appropriate it to its own use, and be liable for only $50.00. *It is our right to know* what became of the trunk. For instance if the answer (and proof) had informed us that the trunk was lost by the carrier, and when, where and how lost, we might have been able to trace and recover the Liberty Bonds, which are our property.

The enforcement of this rule as to pleading and burden of proof imposes no hardship upon the carrier. He is supposed to keep a record of the shipment as it moves from point to point. Every express messenger who handles the shipment is supposed to obtain a receipt from the person to whom he delivers it.

Therefore if the trunk fell from the express car into the Sabine River and could not be recovered, that fact, under a *valid* limited liability clause, would relieve the carrier from all liability over $50.00; but that fact in

order to relieve the carrier must be so pleaded and proved.

If the shipment went to some point in Ia., instead of La., bearing a similar name, and was there sold as unclaimed freight, we have a right to know that fact. *The answer in this case amounts to an admission by the carrier that it converted the goods.*

It strikes us, upon most elementary principles, that this point is well taken, and that the carrier in this case has not by its defense brought itself within the proviso established by the amendment of August 9th, 1916, and that the judgment of the State Court must be affirmed.

So far we have been able to find only one case of this kind which has been passed on by this Court since the amendment of 1916, and that is the case of American Ry. Express Co. vs. Lindenburg, 67 Law. Ed.; Advance Opinions 1922-1923, No. 7, page 227. This being the last case decided by this Court, and maintaining as it does the defense raised here by the petitioner, we will now compare the Lindenburg case with the present case and endeavor to show the differences between the two cases.

1st: In the Lindenburg case the value of the property was neither stated by the respondent nor demanded by the petitioner, and the charges were paid on the basis of the limited liability set forth in the receipt.

In the present case, the shipper did declare the value to be far over Fifty ($50.00) Dollars, in that he told the agent that the trunk contained valuables, and that he did not wish to take it with him as baggage because in that event he would be able to recover only One Hundred and Fifty ($150.00) Dollars.

The respondent here has paid no charges and accepted the proposition of the carrier's agent, that he would pay the charges at destination. He was ready and willing to pay these charges at the time, and has always been ready and willing to pay the charges established by the Interstate Commerce Commission whenever the trunk is delivered to him.

The universal holding is that the reduced carriage charge is the *consideration* for the limited liability clause. In the present case there is no such consideration for it was the agent's fault that the value was not stated in the receipt and was left in blank. The conduct of the agent in omitting the valuation from the receipt and handing the receipt to respondent, with valuation omitted, under the circumstances, respondent being about to catch a train to the agent's knowledge, amounted to a fraud, and the fraud of the agent is the fraud of the Company.

It was entirely the fault of the Company that the receipt was not properly filled by the agent according to respondent's statement to him at the time.

"The choice of rates must be given understandingly and freely."

"The rate must be tied to the release."

U. Pac. Railroad Co. vs. Burke, 65 Law. Ed. 659.

2nd: In the Lindenburg case it was shown that at the time of the shipment there was in effect a tariff governing rates between Indianapolis and Charleston, duly published and filed with the Interstate Commerce Commission setting forth the form of receipt approved by the Commission, and the charges made were in accordance with this tariff. The trunk in the instant case was shipped on February 8th, 1919. This testimony of the agent at Thibodaux (Record, p. 33) shows the rate existing at the time of the trial on June 11, 1920. The documents filed by petitioner (p. 34 et seq.) show that certain schedules had been filed with the Interstate Commerce Commission but no attempt is made to set out these schedules; and most of them are declared to have been in force on February 9th, 1919, which was the day after the shipment was made.

The uniform express receipt approved by the Commission, as given in the record on pages 35-36, contains none of the conditions printed on the back of the receipt; and Condition No. 2 is the very condition on which respondent relies in this case.

It may be that the schedules and conditions annexed to the receipt were filed in the lower Court and were by inadvertance omitted in making up the record for

this Court. If such were really the fact, we have no desire to take advantage of the omission, but are merely calling the Court's attention to the state of the record, and it is plain that according to the record in this Court all of these essential matters were not proved as they were proved in the Lindenburg case.

3rd. In the Lindenburg case the goods were shown to have been delivered by the carrier, *damaged;* and the action was for the amount of the damage *caused by the carrier.* The case was strictly under the Cummins Amendment.

The present suit is for the value of the goods, not because the carrier *lost them,* but because he failed and refused to deliver them, being in the nature of an action for conversion. To defend this action under the Cummins Amendment as amended, the carrier should have set up and proved that it lost the trunk. In Ft. Smith & W. R. Co. vs. Awbrey, 39 Okla. 270; 134 Pac. 1117, it was held that a clause limiting the liability, "in the event of the loss of the property," did not furnish the measure of damages for delay in delivering the property.

See also Delaney vs. U. S. Exp. Co., 70 W. Va. 502; 74 S. E. 512.

## CONCLUSIONS.

From the foregoing Statement of Facts, and Argument, we conclude:

(1)

**It Was The Carrier's Fault, Fraud.**

Under the circumstances stated, and considering the declarations regarding value made by the shipper at the time of shipment, it was entirely the fault of the carrier, that the statement of value was not inserted in the receipt. The leaving the amount in blank, with the statements made by the carrier's agent at the time induced the shipper to believe that the value would be fixed and the rate determined at destination, where the charges were to be paid. To hold the shipper to the strict terms of a receipt delivered under such circumstances, with the statements made at time of delivery of the receipt, would be to give effect to a *fraud* on the part of the carrier's agent. McFadden v. M. P. R. R. Co., 92 Mo. 343, 1 A. S. R. 721; 10 Corper Juris, p. 140, Sec. 178; Christenson v. Exp. Co., 15 Minn. 270, 2 Am. R. 122.

(2)

**Proper Action Brought.**

The shipper in this case brought the only action which, under the circumstances, could be brought against a carrier who fails and refuses to deliver freight entrusted to it. Refusal to deliver is conversion; and the action being for the value is in the nature of an action for conversion. Loss of the goods by the carrier is a defense, knowledge of which is peculiarly within

the carrier and not in the shipper. Failure to set up this defense, or any other valid defense, is an admission of the conversion by the carrier, and judgment must go against it on the face of the pleadings.

(3)

**Cummins Amendment Does Not Apply.**

The Cummins Amendment has no application in the state of the pleadings and proof. It does not purport or pretend to apply to a case of conversion by the carrier.

The Cummins Amendment confines the limitation of liability to cases of *loss by the carrier, damage by the carrier and injury by the carrier.* The express receipt goes far beyond the purview of these three stated instances and relieves the Express Co. from any liability beyond Fifty ($50.00) Dollars, *"in any event."*

So far as the receipt limits this liability *"in any event"* it goes beyond the terms of the law, and if the Interstate Commerce Commission has approved this receipt, the Commission went beyond the terms of the law.

These words "in any event" would protect the Commission in any case falling under the headings of "Loss by it," "Damage by it" or "Injury by it" but could not be construed or given effect outside of those three headings. *The Cummins Amendment has no effect upon the*

*carrier's contract to carry and deliver the freight, except where the freight is lost by the carrier, damaged by the carrier or injured by the carrier.*

The petition, answer and proof in this case have not brought it within the Cummins amendment. So far as the record shows, the trunk is still in the carrier's possession, and the carrier having failed to deliver the trunk, judgment must go against the carrier. The carrier says in this case, "Yes, I received your trunk for carriage to Thibodaux, but as you have admitted, that the trunk is worth only $50.00, I am absolved from all obligation to carry or deliver it by simply paying you $50.00." Such is not the law.

The limited liability clause was intended as a reasonable protection to the carrier against the ordinary cases of negligence and thefts which occur in Interstate Commerce. There are many acts against which the carrier would not,, in good conscience and from public policy, be allowed to claim the benefit of this clause. See 10 Corpus Juris, p. 184. In fact while the clause protects the carrier in case of loss by negligence or passive acts, it cannot relieve it from the consequences of any affirmative acts of wrong doing.

4 R. C. L., verbo Carriers, p. 793, Sec. 251; 12 Ann.Cases 1132 Note.

Adams Express Co. vs. Berry, 35 App. D. C. 208; 31 L. R. A. (N. S.) 309 and note.

Central Ry. Co. vs. Chicago P. Co., 112 Ga. 11; 106 A. S. R. 87. Ann Cas. 192 D. Note, p. 990.

McKahan vs. Am. Exp. Co., 209 Mass. 270; 95 N. E. 785; Ann. Cas. 1912 B. 612.

D'Utassy vs. Bartlett, 219 N. Y. 420; 114 N. E. 786; 5 A. L. R. 979.

Fessler vs. Detroit Co., 5 A. L. R. 983, note p. 986.

(4)

**Consideration**

The consideration for the limited amount of liability has been universally held to be the reduced rate charge.

U. Pac. R. Co. vs. Burke, 65 L. Ed. 659.

In this case an "*affirmative* act of wrong doing" was committed by the carrier's agent in falsely making out the receipt, at the time of the statements of value made by the shipper, and stating to the shipper that value and rate would be determined at destination. Under these circumstances, the stipulation regarding value does not prevent the shipper from recovering full value.

4 R. C. L. verbo Carriers, p. 793, Sec. 251, 12 Ann. Cas. 1133, note.

Gillespie vs. Pratt, (Supra. Ct. App. T.) 19 Misc. (N. Y. 43, 42 N. Y. Supp. 876).

No rate was paid by the shipper, and it was still the carrier's duty to charge the full rate upon delivery.

T. & P. Railway Co. vs. Mug., 202 U. S. 242, 50 L. Ed. 1011.

"The Statute expressly provides that it (the carrier) should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service connected therewith, than such as was specified in such schedules."

U. Pac. R. Co. vs. Burke, 65 L. Ed. 658, 255 U. S. 319.

The shipper expected to pay the full rate upon delivery, and therefore there is in this case no consideration for the limitation of liability. "The rate must be tied to the release." "The choice of rates must be given understandingly and freely." Burke case supra.

Moreover the petitioner has failed to prove the two rates in force, *on the day of the shipment.*

**(5)**

**Estoppel.**

In all of the cases from Hart vs. Penn. R. Co., 112 U. S. 331, 28 L. Ed. 717; 5 S. C. 151, to Am. Exp. Co. vs. Lindenburg, 67 L. Ed. 230, *estoppel* is made the basis of the ruling holding the shipper bound by the limited value clause. "Having accepted the benefit of the lower rate,

in common honesty the shipper may not repudiate the conditions on which it was obtained. * * * "This Court has consequently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contracting for exemption from the consequences of its own negligences and that of its servants, and valuation agreements have been sustained only on principles of estoppel, and in carefully restricted cases, where the choice of rates was given,—where 'the rate was tied to the release.'"

Union Pacific R. Co. vs. Burke, 65 L. Ed. 659; 255 U. S. 321.

In the present case the estoppel is on the other side, and operates against the carrier, because the shipper distinctly stated at the time of shipment that he chose the Express Co. as his carrier, in order that his valuable shipment might be fully protected; and was actually prevented by the carrier's agent from making declaration of value; and actually let to believe that the omission of the value from the receipt left the value and rate to be fixed at destination. The shipper did not accept the benefit of a lower rate, and there is no estoppel as to him.

(6)

Except as exempted by a valid contract the carrier remains a carrier and subject to all the obligations of such.

10 Corpus Juris, p. 187, 241.

Respectfully submitted,

CHAS. T. WORTHAM,

Atty. for Respondent.